IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

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SOFTVIEW LLC,

Plaintiff,

v.

APPLE INC., AT&T MOBILITY LLC, et al.,

Defendants.

: CIVIL ACTION

: NO. 10-389 (LPS)

- - -

Wilmington, Delaware
Tuesday, April 23, 2013
Telephone Conference

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BEFORE: HONORABLE **LEONARD P. STARK**, U.S.D.C.J.

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P R O C E E D I N G S

(REPORTER'S NOTE: The following telephone conference was held in chambers, beginning at 9:20 a.m.)

THE COURT: Good morning, everybody. This is Judge Stark. Who is there, please?

MR. CAPONI: Good morning, Your Honor. For the plaintiffs SoftView, Steve Caponi. With me from Irell & Manella is Sam Lu, Patrick McGill, Elizabeth Iglesias, Andy Ferguson and Zach Davidson.

THE COURT: Okay.

MR. BLUMENFELD: Good morning, Your Honor. It's Jack Blumenfeld for Morris Nichols for AT&T Mobility and Motorola Mobility. With me from Kilpatrick Townsend are Bill Boyce, Dan Young, Laura Mullendore, and Alyson

Wooten.

THE COURT: Thank you.

MR. MOORE: Good morning, Your Honor. David Moore from Potter Anderson on behalf of Apple and AT&T. With me from Gibson Dunn are Josh Krevitt, Mark Lyon, Stuart Rosenberg, and Alison Watkins.

THE COURT: Okay.

MR. POFF: Good morning, Your Honor. Adam Poff from Young Conaway on behalf of Samsung. With me on the line is Christine Haskett from Covington & Burling.

THE COURT: Okay.

MR. COTTRELL: Your Honor, Fred Cottrell, Delaware counsel for Huawei. My co-counsel from Baker Botts, Elliot Williams.

THE COURT: Okay.

MR. STUHLMAN: Good morning, Your Honor. Greg Stuhlman from Greenberg Traurig here in Wilmington. With me on the line from my firm's Chicago office is Herbert Finn.

THE COURT: Okay.

MS. LESTER: Good morning, Your Honor. This is Kate Lester calling from Richards Layton & Finger. I'm on on behalf of Dell with Cathleen Garrigan from Farella Braun & Martel.

THE COURT: Okay.

MR. SHAW: Good morning, Your Honor. John Shaw from Shaw Keller for HTC.

THE COURT: Okay. Anybody else?

All right. For the record, and I do have my court reporter here, it's our case of SoftView LLC versus Apple Inc. the et al, Civil Action No. 10-389-LPS. And first I apologize for keeping you waiting so long. I'm in a trial and so I'm trying to squeeze you all into a lengthy break in the trial. Perhaps not lengthy enough to cover all your issues but we're going to do our best.

We do have a lot of discovery issues here in front of us. I want to try to move through them quickly.

Let's first talk about SoftView's request to compel production of certain expert reports and depositions from the *Samsung v Apple* litigation. And let me hear first from SoftView on this, please.

MR. FERGUSON: Your Honor, this is Andy Ferguson from Irell Manella speaking.

THE COURT: Okay.

MR. FERGUSON: SoftView has requested a very small number of highly relevant documents from Apple and Samsung. These documents are highly relevant because both Apple and Samsung are parties in this case and because Apple's '163 patent, the double touch to zoom patent teaches functionality that is readily comparable to the

functionality taught by these patents. Neither of these are factors are present in any of the case law cited by Apple and Samsung in their briefs. Nor do any of those cases involve a request as limited as SoftView's request is in this case.

THE COURT: Let me ask you a few questions. Does the relevance of these materials turn in any way on the claim construction disputes?

MR. FERGUSON: No.

THE COURT: Okay. In your letter, you seem to assume that there were no real burdens to Apple or Samsung from the production of these documents but the defendants in their letter seem to identify quite a number of burdens. What is your response to that?

MR. FERGUSON: Two points on that, Your Honor.

First, the defendants never identified any third party confidentiality concerns when we were meeting and conferring on this point.

Second, a number of the documents that we've requested should not have any third party confidentiality concerns because both Apple and Samsung are parties are in this case that. That covers both the inventor deposition transcripts and the technical expert reports and deposition transcripts for those experts.

SoftView has tried to minimize the burden by

reducing the number of documents that we've sought to very highly relevant documents, but we couldn't address a burden that defendants didn't raise during the meet and confer process.

THE COURT: All right. Are you seeking these materials just from Samsung or from both Samsung and Apple?

MR. FERGUSON: Both Samsung and Apple. Both parties analyze the contact zooming functionality, which is also present in this case. And both parties will have made admissions that are relevant in this case. So we would like to have the evidence from both parties.

THE COURT: And at least one of the defendants suggests that I might be getting into a possible minitrial, maybe even redoing parts of the *Apple v Samsung* trial if I go ahead and grant this request. Respond to that.

MR. FERGUSON: That argument misses the mark, Your Honor. As to the discovery procedure, we don't determine whether the evidence will be admissible later on. Evidence just needs to be reasonably calculated to lead to the discovery of admissible evidence. Apple is effectively trying to argue a motion in limine at the discovery stage which is improper.

THE COURT: All right. Thank you. Let me hear from Apple or Samsung on this.

MS. HASKETT: Your Honor, this is Christine

Haskett for Samsung.

Your Honor, SoftView hasn't explained why these materials are relevant to any of the issues in this case. They say the technology is similar but they don't explain how they intend to use any of these materials to prove any issue in this case relating to infringement, validity or damages.

These materials relate to a patent, a different patent owned by different parties. It involves very different claim language. The claims in the '163 Apple patent have nothing to do with scaling HTML content, and even the language that SoftView quotes in their brief shows that the patents are very different. The '163 focuses on centering something on a screen which is not present in the patents at issue in this case.

Furthermore, the materials that SoftView is seeking, it's actually a very broad request. Notwithstanding their argument it covers all kinds of materials that have nothing to do even with the '163 patent.

There were many, many patents at issue in the *Apple v Samsung* case, including utility patents, design patents, trademarks, trade drafts and all of the expert reports and expert depositions involve multiple patents. And the issues are all wrapped up together, particularly in the case of the damages report.

The damages report involved multiple different patents and many, many different damages theories that are completely irrelevant to this case, involve things that have nothing to do with a reasonable royalty or with the technology at issue in this case.

THE COURT: How --

MS. HASKETT: So our position is -- I'm sorry.

THE COURT: Yes. How difficult would it be to redact and to segregate out the stuff simply relating to the '163 patent? Would it differ for the technical materials versus the damages materials?

MS. HASKETT: I think the short answer to that is, yes, it would differ.

With respect to the technical materials, to be frank, I think it probably could be done. The technical materials are segregated by patent. There are other patents involved in his report but there are sections that do relate to the '163 patent.

With the damages report, frankly I think it's basically impossible. The damages analysis in the *Apple v Samsung* case obviously were wide ranging and would involve many, many issues. It's all wrapped up together basically.

THE COURT: Focusing then on the technical materials, what confidentiality burden, if any, is there with respect to those?

MS. HASKETT: Well, obviously with respect to the technical materials, I represent Samsung and there is lots of Apple confidential information in there and vice-versa. I'm not immediately aware of third-party confidential information in just the technical materials. And I would defer to Apple's counsel if they're aware of something that I'm not. But the third-party confidentiality concerns I believe are primarily on the damages material.

THE COURT: Okay. Thank you. Did Apple want to speak on this?

MR. LYON: Thank you, Your Honor. Mark Lyon for Apple. Just a couple of points. I agree with everything Ms. Haskett says on behalf of Samsung. I guess two things.

On the burden, I think that is something that it really does focus mostly on the damages as we've been talking. They're very highly tied in with third-party confidentiality.

I agree with Ms. Haskins that it would be very difficult for us to try to segregate out some of that third-party information from the damages portion because the theories get melted in. There is a sort of a tallying up by product, and various products are accused of not only infringement of maybe the '163 patent but many other patents and trade dress rights and other things. It's very difficult for us to segregate that kind of information out

without getting permission both from the Court and from third parties to be able to produce that.

On the technical side, I'm not aware of any third-party confidentiality information, but I think it really goes back to this minitrial point that you alluded to. A lot of this is looking at the relevance of these documents and weighing the burden and sort of the downstream effects. That I think it is a balancing test the Court is asked to do here.

If you look at what the only possible relevance that SoftView seems to be putting forward here, it is that they want to be able to show that this patent and the invention of this patent is important to Apple. Therefore, their invention, SoftView's invention is also important to Apple. So it is comparing patents to patents as opposed to products to the SoftView patent and various other -- or analyzing Apple or SoftView's product by looking at the source code and the various aspects of those products and comparing it for infringement purposes.

That's essentially asking us now to try to explain why what is patented in the '163 is a different invention and is a different approach than what we've done here, and so we get into this sort of minitrial within a trial of whether or not the '163 is really the same as the SoftView patent, and whether we really have the same kinds

of issues, because Apple has something their experts want to cite, and then we have this fight down the road.

It just seems to us this is far afield what they need to be doing. They need to be focusing on the product and on the actual documents themselves that we've produced, not sort of trying to do a bootstrap argument through a different case, different patents, different inventors, different circumstances.

THE COURT: All right. Thank you. We'll give the plaintiff a chance to briefly reply. Start, if you would, on articulating how it is you would use this material to prove any issue in this case, if you were permitted to do so.

MR. FERGUSON: We would use this evidence for two reasons. First, it would be used to prove particular issues in this case. As we noted in our brief, for example, the publicly available version of the expert report from Apple admits that the Apple devices practice contact zooming. The contact zooming that is covered in that expert report is readily comparable to the contact zooming that is covered by SoftView's patents and so that admission will likely be relevant in this case.

In addition to those, that type of admission, this evidence is relevant here because it will lead to the discovery of admissible evidence. For example, Apple's

expert report again analyzed the Samsung source code that performed contact zooming, and that analysis is relevant here and can lead to the discovery of admissible evidence.

Similarly, as actually noted by Apple's counsel, the damages expert report will likely contain evidence of the value of contact zooming functionality to Apple and Samsung's positions on that issue --

THE COURT: All right.

MR. FERGUSON: -- which will be -- go ahead.

MR. LYON: Your Honor, may I briefly respond?

THE COURT: No, thank you. So with respect to this first request, I'm going to grant it in part. I'm granting it only to the limited extent that SoftView will be provided with the technical materials that it has identified in its letter and only those portions that relate to the '163 patent.

I think that these materials do at least have arguable relevance and are at least discoverable at this point. I understand that the burden of producing these technical materials is not that enormous. The technical reports and depositions are evidently relatively manageably segregable to comply with the limited nature of the relief that I'm ordering. There are few, if any, as I understand it, confidentiality and third-party issues given that Samsung and Apple are both parties here in our case.

I'm certainly not deciding at this time anything about admissibility, and I don't intend to have a minitrial or a retrial of the *Apple v Samsung* case but I don't need to make decisions as to admissibility or motions in limine today.

In all other respects, the plaintiff's request is denied. To the extent that there is relevance to the damages information that is sought, that relevance is greatly outweighed by what I understand to be the burden of producing those materials.

Let's move on now. I next have Apple's request that SoftView be ordered to revisit its privilege log claims and produce a more descriptive privilege log. Let me first hear from Apple on that one.

MR. LYON: Thank you, Your Honor. I can short-circuit this very quickly.

We met and conferred with SoftView. I think we have an agreement at this point, so we can withdraw the motion but we would like to do so without prejudice to us perhaps renewing it if, for some reason, the agreement breaks down in the future. But we believe that we resolved we resolved the issues at this point and withdraw the motion.

THE COURT: And that's Mr. Lyon on behalf of Apple?

MR. LYON: Yes, sir.

THE COURT: Thank you. SoftView, are you in agreement with all of that.

MS. IGLESIAS: Your Honor, this is Elizabeth Iglesias for SoftView.

We are in agreement with that.

THE COURT: Fine. Then that one is withdrawn and it's without prejudice to renewal if circumstances arise in which that is necessary.

Next is SoftView's request for reopening depositions of Scott and Teksler. Who is going to address that for SoftView?

MR. McGILL: Your Honor, this is Patrick McGill for Irell & Manella. I'll be addressing the issue.

THE COURT: Okay.

MR. McGILL: Your Honor, at the deposition of Apple witnesses Everett Scott and Boris Teksler, Apple asserted the common interest privilege on negotiations between itself and RPX.

RPX is not a law firm and there is no evidence that RPX ever provided Apple's legal advice. Instead, RPX is a defense patent aggregation service that tracks clients by offering them a license to its patent portfolio.

In 2009, Apple entered into an arm's length negotiation with RPX over a potential monetary contribution

from Apple toward RPX's offer to purchase the SoftView patents in suit.

THE COURT: Mr. McGill, let me stop you there.

You say that with respect to the Scott deposition that we left that issue unresolved but it seems to me that the February 22nd order ruled against your request to reopen the Scott deposition. Am I wrong about that?

MR. McGILL: The February 22nd order did deny the request to reopen the Scott deposition. However, we believe the issue wasn't ripe at that time. It seems that the Court -- and the Court knows what it ordered, but it seems that the Court denied the request to reopen the Scott deposition on the basis that SoftView could inquire into additional details of Mr. Teksler, which SoftView did at Mr. Teksler's deposition and learned that Apple was claiming a broad-based common interest privilege over communications, developed some additional evidence about the relationship between Apple and RPX, and now we believe that the issue is ripe for this Court's determination on the substance of the issue.

THE COURT: Now, if our ruling was not due to lack of ripeness but was on the merits, then I take it you would agree this is an untimely request for reargument with respect to Mr. Scott?

MR. McGILL: With respect to Mr. Scott, then we would agree if the Court ruled on the merits on that issue.

THE COURT: And so if that is where we are, what about Mr. Teksler? Shouldn't the same result follow for him?

MR. McGILL: We don't believe the same result should follow. Mr. Teksler gave us a great deal of additional information about the relationship between Apple and RPX. That is, as you may be able to discern from our letter, that is the foundation. His testimony is the foundation for our understanding of that relationship and our motion to find that there is no common interest between Apple and RPX with regard to these negotiations.

THE COURT: Now, what about the argument there is a common interest between Apple and the other members of RPX?

MR. McGILL: Your Honor, we believe that, just looking at the facts, you can put aside that argument. In fact, Apple, during its negotiation, broke them off due to its interest in purchasing the patents directly from SoftView so it could assert those patents against other RPX members, including Samsung. So we believe that that on its face shows that its interests were not in line with its fellow RPX members.

THE COURT: All right. Alternatively, if I need to reach the issue on the merits of the common interest privilege at least with Mr. Teksler, do you oppose the request that there be full briefing and that RPX be given a chance to be heard on this?

MR. McGILL: Well, Your Honor, we believe that the issue has received a good deal of briefing in our letter briefs, but we do not oppose the additional briefing, if the Court deems that necessary.

THE COURT: All right. Thank you. Who is going to address this for defendants?

MR. LYON: Mark Lyon again for Apple, Your Honor.

THE COURT: Okay.

MR. LYON: So first I would say we have disagree with SoftView whether it's on the merits or not. We believe your earlier ruling on Mr. Scott's testimony was on the merits and there was nothing in your order to indicate it was not. We believe that the issues are basically identical.

If you look at the testimony that has been cited from Mr. Teksler and you look at the testimony that SoftView included from Mr. Scott, Pages 82 to 84, they're asking basically the same types of questions: Was RPX a law firm? Those kinds of questions that we heard today about whether or not their law firm is providing legal advice.

There is nothing really new about the RPX/Apple relationship that came out of the Teksler deposition that wasn't already available to them in the Scott deposition.

In fact, though, there is a common interest here in the sense what RPX is, as everybody knows, I think it is fairly well known organization as a patent aggregator and it has patent members all who are trying to avoid patent litigation by collectively purchasing patents and getting them out of the system so that they're all licensed and there is no threat of litigation from these patents. That is Apple's interest in the RPX. That is the other members interest in RPX.

These discussions which had occurred at a time that was prior to when Apple did actually make this offer that Mr. McGill referred to, to SoftView directly, these were all prior to that time. These discussions were in point where RPX and Apple were in the midst of discussing what to do about the patent. And it was between lawyers, between the companies. It's all of the indications that you have of contributing privileged information between the two companies.

So the common interest really does apply here. There is a single unified interest that occurs between these two, and that is avoiding the litigation that might ensue with this particular patent. There has been nothing

at this point that would serve to prove that that is not something that this Court should endorse. And I think we cited the *Xerox* case, which we believe is very close to what this is, as opposed to some of the other cases such as *Leader* or *Corning* or some of the other cases that SoftView cites where it's much more of an ongoing transaction and purchasing back and forth.

I think the other issue that I would like to point out on the briefing, you mentioned that earlier, is that we do believe this is something that is of significant interest to not necessarily staff, although potentially other codefendants who may be RPX members but also RPX itself, and that if the Court is inclined to provide some sort of waiver or finding that there isn't a common interest privilege here, we would ask for additional briefing to occur because in the 24 hour turnaround cycle here where there are new issues raised in the briefing that hasn't been something we dealt with before, we don't think this has had enough of a full briefing. So we would ask the opportunity to put in declarations and some other things to establish the record and have a little bit better discussion, if the Court is inclined.

THE COURT: Okay. Thank you. Mr. McGill, briefly if you want to respond.

MR. McGILL: Yes, Your Honor. With regard to

Apple and RPX, Mr. Lyon made the assertion there was the common interest. And our response to that is these communications relate to a time period in which there were arm's length negotiations between RPX and Apple. There is ultimately no deal between those two entities to mutually purchase the SoftView patents because there were a different interest at stake in those communications. And that is borne out by the fact that Apple abandoned the negotiations to attempt to purchase the patent themselves. So it shows you that particular circumstance, there were no common interest between Apple and RPX.

Additionally, RPX does not have to avoid any litigation versus SoftView. That's an interest that is relative to Apple alone. Additionally, there is no common interest between Apple and any of its RPX customers. They all have different interests with regard to the SoftView patents. And that again is borne out by the fact Apple attempted to purchase the patents because it believed that other RPX customers infringed them while it did not. So even if you face the litigation with SoftView, there are different interests that are at stake.

Finally, with regard to Mr. Lyon's reference to the *Xerox* case, SoftView believes the *Xerox* case is a far different, the relationship at issue in that case is far different than the one here. In the *Xerox* case, the two

entities had contingency relationships where any litigation, any fruits of that litigation would be shared among them, the lines of interest, quite directly.

We believe a better parallel is the *Leader Tech* case which Your Honor also decided. In that case, they were of different interests and negotiations towards the potential investment, which is what we have in this case here. So we believe *Leader Tech* case is a better parallel that Your Honor should take as instructive as opposed to the *Xerox* case.

THE COURT: All right. Thank you. With respect to this request from SoftView, I'm denying this request.

Relating to Mr. Scott, we did intend our February 22nd order to be a decision on the merits with respect to the request to reopen the deposition of Mr. Scott. Now, granted, you all had put a great deal at issue in connection with that order so I can understand there may be some lack of clarity, but that was a ruling on the merits, and there is no basis to reconsider it now.

Nor, today, have I been persuaded that there is a basis to rule differently with respect to the request to reopen the Teksler deposition. So we're not going to revisit that issue in the context of Mr. Teksler either and, therefore, the request for relief is denied.

Next on my list is SoftView's requests for production of ATTM data plans subscriptions and usage data. So let me hear from SoftView on that.

MR. DAVIDSON: Your Honor, this is Zach Davidson from Irell & Manella on behalf of this issue.

THE COURT: Okay.

MR. DAVIDSON: The sales of data plan information that SoftView is requesting is highly relevant and directly related to the accused functionalities at issue in SoftView's patents. These are sales that would have been accounted for in a hypothetical negotiation with either class of defendants, either AT&T or with the manufacturer defendants.

SoftView's claimed invention opens up the web to these type of devices at issue in this case, and they create the demand both for the accused products and as well as for the data plan subscriptions themselves. The inventions that were clear in fact of promoting data plans sales, SoftView needs the requested information to measure out that, and they're relevant against the manufacturer defendants for the same reason they are relevant against AT&T.

During a hypothetical negotiation with the manufacturer, SoftView would have taken into account in negotiating a royalty rate the likelihood that the manufacturer would be able to extract a higher price from

the carrier by virtue of the demand that the invention creates for the carrier's data plan subscription. This is especially true against any defendant who may have a revenue sharing with AT&T such that they directly share in the revenues, the result from the sales of the data plan.

There is no reason that SoftView couldn't have structured its hypothetical negotiation jointly with AT&T and with a manufacturer defendant like Apple or either class of defendants separately.

When the patent first issued in 2008, both class of defendants were infringing. Both AT&T and the manufacturer defendants benefit from these sales, and AT&T is essentially trying to tell SoftView what its theory of damages needs to be.

There are a number of ways SoftView could have structured the hypothetical negotiation, but the point is we're at the discovery stage right now and AT&T is trying to lead us into a discussion over the merits that is better suited for expert discovery.

THE COURT: All right. Let me stop you there. Are you seeking double damages recovery?

MR. DAVIDSON: We're not seeking double damages recovery, Your Honor. We can seek damages from AT&T or from the manufacturer defendants.

THE COURT: But when it comes time to actually

recover damages, if there are any, you are not seeking to recover the same damages twice?

MR. DAVIDSON: No, Your Honor. We're seeking to take into account convoyed sales on the royalty rate and the hypothetical negotiation that SoftView could have engaged in with AT&T or with a manufacturer defendant.

THE COURT: Is it your contention that the data plan subscription and the usage data are both relevant to damages?

MR. DAVIDSON: Yes, Your Honor. The usage data shows that the claimed functionality which creates the demand for the browsers, by showing that the web browsers use data more often than other applications that use data, it shows that SoftView's invention creates demand not only for the accused products but also for the data plan subscriptions.

THE COURT: And there is a suggestion that you're asking for some relief from me that isn't something that you asked for through a proper discovery request in a timely manner. What is your response to that?

MR. DAVIDSON: I believe that it's with respect to the usage data. We believe that the request we served requesting documents relating to the retrieval of web pages on AT&T's network should include reports on the amount of data used for that purpose. AT&T did produce some such

information. They then revealed to us during meet and confer that they had not produced all of that information, and they represented that their basis for limiting the 30(b)(6) testimony on this subject was that they didn't regularly track this information. They since retracted that representation. We know they keep this information and we believe SoftView's request was broad enough to request that information.

THE COURT: All right. Let me hear from the defendant.

MR. YOUNG: Your Honor, this is Dan Young from Kilpatrick Townsend. I'll be handling the data plan issue, and I believe counsel either Mark Lyon or Josh Krevitt will be discussing the data usage plan.

With respect to the data plan information, I think the facts of this case show that SoftView understands that this is not relevant. This is a case involving the manufacturers of smartphones and the specific functionality related to those phones. For example, the accused functionality and the infringement contentions that SoftView has served against AT&T, all they do is they cite to the manufacturers.

The only accused activity that AT&T is cited for infringement is the reselling of these phones. AT&T is the only reseller in this case. The manufacturers have

relationships with numerous resellers: Verizon, T-Mobile, Sprint, Cricket. They have not added, SoftView has not added any of the resellers to this case, nor have they sought any kind of third-party discovery from them. So as a result, you have over 350 accused products in this case, all phones that are manufactured by these various manufacturer defendants, and only 59 of them AT&T is accused of infringing.

For example, Samsung had 94 accused products in this case. Only 19 of them AT&T resells. HTC has 58 accused products, only nine of them AT&T resells. So even if SoftView were to prevail on this discovery issue, which they should not, they're not going to have data plan revenue for the vast majority of accused products in this case.

They made a decision to pursue damages from the manufacturers, and they have said they're going to get a full measure of damages from the manufacturers regardless of whether they get the data plan revenue information.

In this situation, and SoftView alluded to it in their response to your questions, Your Honor, they have elected to pursue damages against the manufacturers. And they said they're going to get complete recovery from these manufacturers. Most of these phones will have nothing to do with the data plan revenue for AT&T.

Courts have said in the *Itex* case, and I'm

quoting from the *Itex* case, "The entire amount of potential damages will be accounted for in a hypothetical royalty between the plaintiff and the manufacturers, rendering the details of a customer's downstream sales irrelevant."

THE COURT: All right. Let me interrupt you there.

MR. YOUNG: Yes, Your Honor.

THE COURT: Aren't the data plan sales and subscription sales here central to the business model of AT&T?

MR. YOUNG: Your Honor, they are with respect to AT&T, but that is not the accused sale. The accused sale is from the manufacturers to their customers. The data plan relates to the sales from AT&T to its customers, the actual individual users of the phones.

THE COURT: Is there any --

MR. YOUNG: With respect to the -- I'm sorry, Your Honor.

THE COURT: Yes, sorry. Is there any evidence as to whether the price of the phones is impacted by the requirement to purchase a data plan?

MR. YOUNG: Your Honor, the price that is relevant is the price that AT&T pays to the manufacturers. That price is going to include the amount of money that -- or account for the amount of money that AT&T can make for

the phones. The manufacturers all know that the resellers, the phone, the carriers in this case like AT&T, Verizon, T-Mobile and others sell the phones with data plans. So the price of those carriers pay to the manufacturers includes that information.

So to the extent that SoftView says, well, the amount of money that AT&T is going to make off these phones is relevant, that is already included in the price of the phones that AT&T has paid to the manufacturers. And that information, we've already produced in the case. They already have that information.

What they're trying to do is bootstrap additional revenue downstream revenue and roll it again, double dip. They already accounted for it once. And the manufacturers have sold the phone to AT&T. Now they're going to add it back in again and try to increase the price even more. And that is improper, as we've said.

As the cases, the Supreme Court said in *Quanta* and the Federal Circuit said in *Glenair*, once you have gotten your full compensation from the first sale, and they have chosen to go after the manufacturer sales to the resellers, once you have gotten that, any effect of the downstream price of the products is irrelevant because the plaintiff has already gotten full compensation and that plaintiff's rights in the patents are exhausted after that

first sale.

THE COURT: All right. I have to stop you there. If somebody wants to talk on usage data, I'll give you a brief chance to do that on the defense side.

MR. LYON: Thank you, Your Honor. This is Mark Lyon on behalf of AT&T for the usage data.

The usage data we're talking about here is not relevant in the sense that it is not talking about how often people use the web or how often they might serve or search to zoom, pan or do the other things that are important to the patent. What it has to do is just sort of the volume of the data that is used.

So what you get here is a situation where if somebody downloads a movie, they may be downloading megabytes of data and it may be one instance as opposed to somebody who is using e-mail or using some other kind of a web page, just a static text page that may be 30-40 times of the same kind of downloading but have the same amount of data. So it doesn't really give you any caliber to how often this is used and how much of a value this is to the company in that sense.

THE COURT: Is it so unrelated that I could say it is not reasonably calculated to lead to discovery of admissible evidence?

MR. LYON: I believe so, Your Honor. Because I

believe to the extent SoftView tries to use this as some measure of damages and particularly to try to somehow come up with a theory that uses this to gauge what percentage of revenues really apply here, it would be something that wouldn't be supported. It would be an unsupportable proposition because there is just no relationship here to how this actually impacts how often the devices would be infringing these patents.

THE COURT: All right. I've got to give Mr. Davidson just a brief chance to reply, if he wishes.

MR. LYON: Thank you.

MR. DAVIDSON: Sure. Your Honor, before this invention -- so the defendant is shortchanging what is claimed in this invention. We're not just talking about panning and zooming. We're talking about creating a web experience, including preserving the layout functionality, design, that creates the demands for these data subscriptions.

Data before the invention was used far less often than data was used after of the invention, and we think the invention creates the web browsing experience that causes people to use the web browser for these highly data intensive experiences.

THE COURT: All right. Thank you. I'm going to grant SoftView's request here relating to the evidence of data plan subscriptions and the usage data. Let me say

parenthetically, I did not resolve these disputes previously on the merits. In February to the extent that they were raised at all, we found that they were not ripe in light of representations that certain materials would be produced thereafter.

With respect to, on the merits, the data plan subscription information and the usage data, I think they are within the broad scope of discovery, are reasonably calculated to lead to discovery of admissible evidence. It may turn out to be that there is an expert or somebody else out there who would find there is sufficient correlation between the usage data and the use of the infringing functionality or accused infringing functionality.

And in terms of the data plan subscriptions, there may be a reasonable argument that the hypothetical negotiations would consider this extra data about the data plan subscriptions, and maybe it is not adequately accounted for already in the materials that have already been produced.

The point is we're still only at discovery. The damages theories are left to be developed with the expert's assistance, and I'm going to go ahead and grant the relief requested.

That leaves me just with SoftView's request for production of certain agreements between Apple and ATTM. I think I may only need Apple and AT&T and SoftView on the

phone for that. Is that SoftView's perspective as well?

MR. FERGUSON: We defer to defendants on that that, Your Honor.

THE COURT: Who wants to speak to that?

MR. LYON: This is Mark Lyon, Your Honor. We would ask the other defendants be asked to drop off the call because this does relate to one of the most highly competitively sensitive agreements Apple has at this point.

THE COURT: And you would agree to AT&T being on the call, too?

MR. LYON: Yes, that's fine, Your Honor.

THE COURT: Okay. Does anybody object to that?

MS. HASKETT: Your Honor, this is Christine Haskett for Samsung.

I have no objection as long as this portion of the argument isn't going to relate to AT&T's agreement with Samsung.

THE COURT: Okay. On SoftView's behalf, there is no reason we would have to discuss the agreement with Samsung; correct?

MR. FERGUSON: Well, they are withholding the agreement with Samsung as well, so we believe both agreements should be produced, although only Apple has represented that the agreement is so sensitive that it can only be discussed with AT&T and Apple's counsel present.

THE COURT: And remind me. Do I have in front of me a dispute as to a request for the Samsung agreement?

MR. FERGUSON: Yes, Your Honor. We would request unredacted copies of both.

MS. HASKETT: Your Honor, may I speak to that just briefly?

This is again Christine Haskett for Samsung.

My understanding there is a dispute before you between SoftView and AT&T as to that agreement. However, we, Samsung, also object to the production of that agreement but we were not included in the meet and confer leading up to this. In fact, we haven't even been served with unredacted copies of the briefing. So we actually believe that this dispute should not be before the Court at this time at least with respect to Samsung because we have not had an opportunity to be heard.

THE COURT: Okay. We'll come back to that in a minute.

First, any of my defendants other than Apple, AT&T and Samsung request the opportunity to stay on the rest of the call?

I'm hearing nothing, so I'm going to take that as no objection. So let's say good-bye to all of you if you are not Samsung, Apple, AT&T or SoftView.

MR. LU: Before we say good-bye, this is Sam Lu.

We have a point of clarification. And Andrew Ferguson will raise this issue.

MR. FERGUSON: Your Honor, this is Andrew Ferguson from Irell & Manella.

We would like to request clarification on your earlier ruling on the *Apple v Samsung* document. We would like to make sure that the technical materials you ordered the production of includes the Apple inventor deposition transcript.

THE COURT: To the extent they're talking about the technical aspects of the '163 patent, yes. But in all other respects, no. Does that clarify it?

MR. FERGUSON: Thank you. Yes.

THE COURT: All right. So we're saying good-bye to the other defendants.

MR. WILLIAMS: Yes. I'm sorry, Your Honor. Just for clarification. This is Elliot Williams.

We represent Huawei but we have also made an appearance for AT&T, Ltd. as to the allegations against the Huawei. I just want to make clear this discussion you are going to have now does not relate to Huawei phones; correct?

THE COURT: SoftView, is that correct?

MR. FERGUSON: It is not related to Huawei, Your Honor.

MR. WILLIAMS: Okay. Then I will drop off. Thank you.

THE COURT: Thank you.

(Following portion ordered sealed by the Court, bound separately. Unsealed portion ends at 10:02 a.m.)

I hereby certify the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

/s/ Brian P. Gaffigan
Official Court Reporter
U.S. District Court